

CT 07-1

Tax Type: Cigarette Tax

Issue: Possession of Unstamped Cigarettes

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS

THE DEPARTMENT OF REVENUE)	Docket No.	0000-0000-0-00
OF THE STATE OF ILLINOIS)		
v.)	John E. White	
JOHN DOE,)	Administrative Law Judge	
Respondent)		

RECOMMENDATION FOR DISPOSITION

Appearances: Shepard Smith appeared on behalf of the Illinois Department of Revenue; *John Doe* appeared *pro se*.

Synopsis: This matter arose after agents of the Illinois Department of Revenue's (Department'[s]) Bureau of Criminal Investigations (BCI) took custody of 2,251 packages of cigarettes that agents of the Federal Bureau of Investigation (FBI) and of the United States Bureau of Alcohol, Tobacco and Firearms (ATF) seized from the residence of *John Doe (Doe)*, on October 19, 2004. The Department thereafter notified *Doe* that a hearing would be held to determine whether those cigarettes were subject to forfeiture, and whether *Doe* was liable for penalties, pursuant to applicable provisions of Illinois' Cigarette Tax Act (CTA).

A hearing was held at the Department's Office of Administrative Hearings in Chicago. I have considered the evidence and arguments presented at hearing, and I am including in this recommendation findings of fact and conclusions of law. I recommend that the Director order the cigarettes forfeit, and that *Doe* be held liable for penalties, as provided by statute.

Findings of Fact:

1. At roughly six in the morning on October 19, 2004, and pursuant to their execution of an arrest warrant, ATF and FBI agents placed **Doe** into custody at his residence in Chicago, Illinois. **Doe** Ex. 1, p. 1; Department Ex. 1, p. 3; Hearing Transcript (Tr.) pp. 12-14 (testimony of FBI agent David Kotal (Kotal)).
2. Following that arrest, **Doe** signed a form consenting to a search of his residence. **Doe** Ex. 1, p. 1; Department Ex. 1, p. 3.
3. Pursuant to that search, agents observed and seized from **Doe**'s residence approximately 224 cartons — specifically, 2,251 packages — of cigarettes that did not have Illinois tax stamps affixed to them. Department Ex. 1, pp. 2-3, 19; Tr. pp. 12-14 (Kotal).
4. The agents inventoried the 2,251 packages of cigarettes, and other property, and subsequently notified BCI agents of that seizure. Department Ex. 1, pp. 2-3, 17; Tr. pp. 13-14 (Kotal).
5. BCI agent James Lippner (Lippner) took physical possession of the 2,251 packages of cigarettes from the FBI's custody on October 19, 2004. Department Ex. 1, pp. 2-3, 18-20; Tr. pp. 13-14 (Kotal); 15 (Lippner).
6. On May 3, 2005, Lippner interviewed **Doe** regarding the cigarettes seized from his residence on October 19, 2005. Department Ex. 1, pp. 5-6.
7. During that May 5, 2005 interview, **Doe** made several statements to Lippner, some of which were, in summary, but not verbatim, as follows:

- He (*Doe*) purchased the cigarettes seized from his residence via internet transactions from Indian reservation sites, using a credit card. Department Ex. 1, p. 6. He purchased them in this manner, that is, online via computer in his residence, because they were cheaper. *Id.*
 - He “was looking to make a few dollars” with the cigarettes he bought online, but he never sold any of them. Department Ex. 1, p. 7.
 - If he were to resell cigarettes, he would sell them to persons on the street. Department Ex. 1, p. 7.
 - He knew that the cigarettes he purchased online did not have Illinois tax stamps affixed to them when they were delivered to him. Department Ex. 1, p. 6.
8. *Doe* was not a licensed Illinois distributor of cigarettes. Department Ex. 1, p. 23.

Conclusions of Law:

The issues are whether the 2,251 packages of unstamped cigarettes shall be declared forfeit pursuant to § 18a of the CTA, and whether *Doe* is liable for a penalty for possessing those cigarettes pursuant to §§ 18b and/or 18c of the CTA. Section 18a of the CTA provides, in part:

After seizing any original packages of cigarettes, or cigarette vending devices, as provided in Section 18 of this Act, the Department shall hold a hearing and shall determine whether such original packages of cigarettes, at the time of their seizure by the Department, were not tax stamped or tax imprinted underneath the sealed transparent wrapper of such original packages in accordance with this Act,

If, as the result of such hearing, the Department shall determine that the original packages of cigarettes seized were at the time of seizure not tax stamped or tax imprinted underneath the sealed transparent wrapper of such original

packages as required by this Act, ... the Department shall enter an order declaring such original packages of cigarettes or such cigarette vending devices confiscated and forfeited to the State, and to be held by the Department for disposal by it as provided in Section 21 of this Act.

35 ILCS 130/18a.

Here, the evidence shows that, on October 19, 2004, 2,251 packages of cigarettes that did not have Illinois tax stamps affixed to them, as required by the CTA, were seized from *Doe*'s residence. Department Ex. 1, p. 2. During an interview with a Department agent regarding the seizure of those cigarettes, *Doe* admitted that the unstamped cigarettes were in his residence because he purchased them online from vendors outside Illinois, knowing that, when the cigarettes were delivered to him, the packages would not have Illinois tax stamps affixed to them. Department Ex. 1, pp. 6-7. Because there is no dispute that the 2,251 packages of cigarettes "were not tax stamped ... in accordance with [the CTA]", I conclude that the cigarettes should be confiscated and forfeited to the State. 35 ILCS 130/18a.

As to the assessment of a penalty, § 18b of the CTA provides:

With the exception of licensed distributors, anyone possessing cigarettes contained in original packages which are not tax stamped as required by this Act, or which are improperly tax stamped, shall be liable to pay, to the Department for deposit in the State Treasury, a penalty of \$15 for each such package of cigarettes in excess of 100 packages. Such penalty may be recovered by the Department in a civil action.

35 ILCS 130/18b. Effective 2002, the Illinois legislature amended the CTA and added a new penalty for a person's possession of between 10 to 100 packages of unstamped cigarettes. The newly added section provides:

With the exception of licensed distributors, anyone possessing not less than 10

and not more than 100 packages of cigarettes contained in original packages that are not tax stamped as required by this Act, or that are improperly tax stamped, is liable to pay to the Department, for deposit into the Tax Compliance and Administration Fund, a penalty of \$10 for each such package of cigarettes, unless reasonable cause can be established by the person upon whom the penalty is imposed. Reasonable cause shall be determined in each situation in accordance with rules adopted by the Department.

35 ILCS 130/18c. Virtually identical penalty provisions are also included within Illinois' complementary Cigarette Use Tax Act (CUTA). 35 ILCS 135/25a-25b.

The evidence reflects that *Doe* was not a licensed distributor of cigarettes.

Department Ex. 1, p. 23. Section 13 of the CTA provides, in pertinent part:

Whenever any original package of cigarettes is found ... in the possession of any person who is not a licensed distributor under this Act without proper stamps affixed thereto, or an authorized substitute therefor imprinted thereon, underneath the sealed transparent wrapper of such original package, as required by this Act, the prima facie presumption shall arise that such original package of cigarettes is kept therein or is held by such person in violation of the provisions of this Act.

35 ILCS 130/13. Since *Doe* admitted purchasing and possessing cigarettes he knew did not have tax stamps affixed to them (Department Ex. 1, pp. 6-7), the evidence here further supports the conclusion presumed by CTA § 13 — that *Doe* possessed the unstamped cigarettes in violation of the CTA. 35 ILCS 130/13.

The evidence supports a conclusion that *Doe* is liable for the penalty imposed by CTA § 18b. Based on the same facts, I also conclude that *Doe* is liable for the penalty imposed by CTA § 18c. As to the latter penalty, the record includes no evidence which shows that *Doe* exercised ordinary business care and prudence when attempting to report, as required by either the CTA or the CUTA (35 ILCS 130/2, 3, 9; 35 ILCS 135/2, 12), his

possession of the cigarettes he purchased from outside Illinois, or to determine the correct tax to pay regarding his possession of those cigarettes.

Conclusion:

Doe knowingly possessed the 2,251 packages of cigarettes that were recovered from his residence, and which did not bear Illinois tax stamps as required by the CTA. Department Ex. 1, pp. 2-3. Therefore, I conclude that the cigarettes seized should be confiscated and forfeited to the State. 35 **ILCS** 130/18a. I also conclude that *Doe* is liable for penalties authorized by §§ 18b and 18c, in the amount of \$33,265. 35 **ILCS** 130/18b-18c ((2,151 x 15) + (100 x 10) = 32,265 + 1,000 = 33,265)).

Date: 4/24/2007

John E. White
Administrative Law Judge